

“NO HABLO INGLÉS”
(A Written Agreement plus Consent Equals
Contractual Liability of Illiterates?)

“California has over 3.5 million Spanish surnamed residents. In consumer dealings, some of these individuals are at a distinct disadvantage because of their inability to fully understand English. This problem is generally compounded because regardless of whether the dealings are transacted in English or Spanish, the contract signed by the consumer is inevitably in English. While many English speaking consumers are able to fathom the meaning of the contract they sign, no non-English speaking person can.” Al Shelden, Deputy Attorney General of California.*

“It is a truism that life is more difficult in an English speaking country for a person who does not speak English . . .” Justice Mosk of the Supreme Court of California in *Guerrero v. Carleson*, 9 Cal. 3d 808, 812, 512 P.2d 833, 836, 109 Cal. Rptr. 201, 204 (1973).

A large segment of the population of California is Spanish speaking. Many of these persons are bilingual, but many more are only proficient at reading and speaking in their native tongue. Members of this latter group are often compelled to enter into written agreements which they cannot read since the United States is basically an English speaking country. An examination of how courts have dealt with the contractual liability of persons unable to read the language of a written contract they have signed, and how these persons can be relieved of their contractual liability when held bound, is the purpose of this article.

PART I

FORMATION OF CONTRACTS IN GENERAL

In the law of formation of contracts two theories have been developed. One, the objective theory, is based on the principle that a person's real intent is immaterial in the formation of a contract and his outward manifestations are alone decisive in determining if a contract has been formed.¹ The other theory is contra, following the principle that an agreement in intention is necessary to

* The views expressed in this article are those of the author and not necessarily of the Attorney General's office.

1. 1 A. CORBIN, CONTRACTS § 106 (1960).

create a contract.² The latter is called the subjective or will theory.

For purposes of this article, the discussion will be concerned with how and if a person ignorant of the terms of a written contract due to a language barrier can be bound under either theory.

As a result of these conflicting theories, it is uncertain as to what is actually required for the formation of a valid contract. The four elements generally essential to a valid contract are: competent contracting parties, a lawful objective, sufficient consideration, and *consent*.³ This last element is the only one which can be disputed solely because a person is unable to read the language of the contract, and this inquiry will accordingly be limited to the role of consent or lack thereof in the formation of contracts of illiterates.

The essentials of a valid *consent* are that it be free, mutual and communicated to each party.⁴ That mutual consent is necessary for a contract to be formed is evident; however, what mutual consent actually requires on behalf of the contracting parties, and whether a "meeting of the minds" is a necessary part of the mutual consent is not altogether clear. For example, mutual assent has been defined as a "meeting of the minds"⁵ although a distinction between the two should be made in view of the fact that it is the generally accepted rule that mutual assent can exist in the absence of a real meeting of the minds.⁶ This distinction becomes quite evident when a person, though ignorant of the contents of a writing, is held to have a mutual consent with the other contracting party as to those contents. In most jurisdictions these persons have been held bound to such transactions.⁷

The general rule is that, in the absence of fraud, one who signs a written contract is bound by its terms whether he reads and understands it or not or whether he can read or not.⁸

2. *Id.*

3. CAL. CIV. CODE § 1550 (West 1954); see *California State Auto. Ass'n Inter-Ins. Bureau v. Barrett Garages*, 257 Cal. App. 2d 71, 76, 64 Cal. Rptr. 699, 702 (1967), where the court said, "It is essential to the existence of a contract that there be mutual consent." But cf. *Larrus v. First Nat'l Bank of San Mateo County*, 122 Cal. App. 2d 884, 889, 266 P.2d 143, 147 (1954), where it was said, "It is quite possible for a party to assent to be bound in accordance with terms of which he is then ignorant. . . ."

4. CAL. CIV. CODE § 1565 (West 1954).

5. BLACK'S LAW DICTIONARY 149 (4th ed. 1951):

ASSENT Mutual Assent

The meeting of the minds of both or all the parties to a contract; the fact that each agrees to all the terms and conditions, in the same sense and with the same meaning as the others.

6. L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 9 (2d ed. 1965).

7. See, 3 A. CORBIN, CONTRACTS § 607 (1960, Supp. 1971), and cases cited therein.

8. *Cohen v. Santoianni*, 330 Mass. 187, 193, 112 N.E.2d 267, 271 (1953).

Although persons in these situations have been held to contractual liability, it is clear that there is no real meeting of the minds present. This has been unequivocally acknowledged by Professor Corbin in his authoritative treatise:

There is no actual 'meeting of the minds' even though the terms of the bargain are reduced to writing and signed by both parties, if one of them did not in fact read or understand the written terms.⁹

Professor Williston, the other recognized authority in the field of contracts, is in complete agreement with this statement.¹⁰

A person attempting to contract in ignorance of the terms of the contract, therefore, must be bound under some theory that does not require an actual meeting of the minds, and consequently in these situations the objective theory of formation of contracts has been utilized. Naturally, if a person is in a jurisdiction where the subjective theory of formation of contracts is still in vogue, then a lack of a true meeting of the minds would be sufficient grounds to avoid the contract.¹¹ As brought out immediately *supra*, failure to have knowledge of the terms of a contract does result in a lack of a meeting of the minds between the proposed contracting parties.¹² Additionally, if a person is held bound by the subjective theory then he would always be bound in a jurisdiction adhering to the objective theory. The converse, however, is not always true, and to fully understand why this is so, a discussion of the component parts of the latter theory is required.

In applying the objective theory in cases involving illiterates, different courts tend to use different rationales. Some cases hold that a person is presumed to know the contents of a writing and one's acceptance of such indicates an assent to the terms, whatever they may be.¹³ Other cases tend to follow an estoppel principle, basing it on the idea that the illiterate¹⁴ person's conduct in signing was such as to mislead the other party and the illiterate is now

9. See A. CORBIN, *supra* note 1, at § 107.

10. 1 S. WILLISTON, *CONTRACTS* § 95A (3d ed. W. Jaeger 1957).

11. Note, *Contract Clauses in Fine Print*, 63 HARV. L. REV. 494 (1950).

12. A. CORBIN, *supra*, note 1, at § 107.

13. *Stockinger v. Central Nat'l Ins. Co.*, 24 Wis. 2d 245, 128 N.W.2d 433 (1964).

14. For want of a better word, *illiterate* will be used throughout this article to refer to a person unable to read the language of the written instrument.

estopped to deny his consent to the contract.¹⁵ Still other courts use language to indicate that a person who signs a writing without first ascertaining the nature of its contents acts in a negligent manner, and one will not be relieved of his own negligent conduct.¹⁶ A more detailed discussion of these three rationales will more clearly bring out the reasoning behind the objective theory.

Presumption of Understanding

There is a presumption that a person who signs an instrument understands its contents, regardless of the signer's contentions to the contrary.¹⁷ Consequently, a person will not be allowed to disaffirm a contract by simply contending that it was not read to him and that he did not understand its provisions.¹⁸ This presumption has not, however, been applied in all contractual settings. For example, it has been held that the presumption that a person has knowledge of the contents of a written contract is not applicable to insurance contracts because they are usually confusing, long and very rarely read by the insured.¹⁹ Another exception to the application of this presumption has been held to exist where the person involved was unable to read the terms of the written contract.²⁰ In *McKlosky v. Kobylarz*,²¹ the two complainants were from Austria and thus were unfamiliar with the English language used in the written instrument. The court held that notwithstanding the general rule that one will not be permitted to prove that he did not understand a written contract when his signature appears thereon, if one is unable to read then he will be permitted to prove his lack of understanding as an exception to the rule. The court, by holding this way, in effect changed the presumption from a conclusive to a rebuttable one.

15. Phelps, *The Nature of Mutual Assent in Contracts*, 10 OKLA. L. REV. 410 (1957); cf. *Deering-Milliken & Co. v. Modern-Aire of Hollywood*, 231 F.2d 623 (9th Cir. 1955), where the court held that a contract could not be formed by estoppel. This statement would seem to be rather liberal in view of the generally accepted "objective theory." In a case cited by the *Deering* court, it was held that a contract can be formed by equitable estoppel when the party asserting it is ignorant of the true facts. This is a more accurate view of the law concerning contracts formed by estoppel. *Toms v. Hellman*, 115 Cal. App. 74, 1 P.2d 31 (1931).

16. *Knox v. Modern Garage & Repair Shop*, 68 Cal. App. 583, 229 P. 880 (1924).

17. *Stockinger v. Central Nat'l Ins. Co.*, 24 Wis. 2d 245, 128 N.W.2d 433.

18. *Ideal Loan of New Orleans, Inc. v. Johnson*, 218 So. 2d 634 (La. 1969).

19. *Laing v. Occidental Life Ins. Co. of California*, 244 Cal. App. 2d 811, 53 Cal. Rptr. 681 (1966).

20. *Ciampoli v. Prudential Ins. Co. of America*, 5 N.J. Super. 302, 68 A.2d 883 (1949).

21. 99 N.J. Eq. 202, 132 A. 497 (1926).

This theory of a presumption is a rule of evidence and is applicable to the estoppel and negligence rules and is in reality a division of the two. It is also apparent that this presumption and the determination as to whether it can be rebutted or not will be of importance in a subjective as well as objective jurisdiction. If the court followed the subjective theory, then a failure of the meeting of the minds would be impossible to prove unless the court allowed this presumption of understanding to be rebutted.²² It is important to further realize that many courts do not even mention this presumption, and allow proof of a lack of knowledge and understanding of a contract's written terms as a matter of course. This is not to say, however, that the court will consequently hold the contract unenforceable as a matter of course. As will be seen, knowledge and understanding of the contract's provisions are not prerequisites to a binding contract under the objective theory.

The negligence and estoppel principles are somewhat interrelated and can be better discussed together.

Negligence and Estoppel

Section 70 of the Restatement of Contracts states:

One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.²³

Under this rule if a person was aware that a paper was a contract and signed it, he would be held strictly accountable to the terms of the contract. It would be irrelevant why he failed to read the con-

22. A similar presumption is that one who signs a written instrument is presumed to assent to all of its terms. See *Security First Nat'l Trust & Sav. Bank v. Loftus*, 129 Cal. App. 650, 19 P.2d 297 (1933).

23. In the tentative draft of the RESTATEMENT (SECOND) OF CONTRACTS (Tent. Draft No. 1, 1964), § 70 has been omitted. §§ 20-23 are cited as sources for material formerly covered by § 70. § 20 states:

Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.

Section 21 in pertinent part states:

3/ The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

(§§ 22 and 23 are not applicable to this topic.)

tract or otherwise learn its contents. Most courts, however, that adhere to the objective theory have developed a principle of negligence rather than following the Restatement's theory of strict liability to determine if a person should be bound to a contract. The negligence theory is possibly best stated by a California court which has said:

. . . a person is bound by the printed contractual provisions of an instrument which he accepts delivery of if, as an ordinary prudent man, he *could* and *should* have read such provisions.²⁴

This holding seems to imply an exception applicable to the situation where a person is unable to read. However, *Schmidt v. Bekins Van & Storage Co.*²⁵ did deal with that situation and applied substantially the same rule. The *Schmidt* court held that a person under a language disability is still required to exercise the care of a reasonable man before entering into written transactions, and as a reasonable man he is under a duty to have the instrument read to him before he executes it or "assents" to the agreement.²⁶ His failure to do this is an indication of negligence on his part and the contract can be held binding on him regardless of his lack of real assent.

It can be recognized, therefore, that as a primary rule one who is unable to read is under a legal duty to have someone read the document to him before he enters into the proposed agreement.²⁷ His failure to so act can result in his being presumed to assent to all the terms of the agreement.²⁸ There are exceptions to most rules, however, and there are exceptions to this one. Negligence is a flexible standard, and what is held to be negligence under one set of circumstances will perhaps not be considered negligence under another. Whether or not failure to ascertain the contents of a writing prior to signing is negligent conduct will depend largely on the facts of each particular case.²⁹

In *Dorrity v. Greater Durham Building & Loan Ass'n.*,³⁰ it was ruled that failure to read an agreement prior to its execution was not negligence *per se* where the person involved was illiterate. The court in *Dorrity* did not touch on the alternative duty of pro-

24. *California State Auto. Ass'n Inter-Ins. Bureau v. Barrett Garages*, 257 Cal. App. 2d 71, 76, 64 Cal. Rptr. 699, 703 (1967).

25. 27 Cal. App. 667, 155 P. 647 (1915).

26. *Id.* at 670, 155 P. at 648.

27. *Roberd v. First Fed. Sav. & Loan Ass'n*, 490 S.W.2d 243 (Tex. Civ. App. 1973).

28. *Boylan v. Hot Springs R.R.*, 132 U.S. 146 (1889).

29. *California Trust Co. v. Cohn*, 214 Cal. 619, 7 P.2d 297 (1932).

30. 204 N.C. 698, 169 S.E. 640 (1933).

curing someone to read the instrument to the intended signer. Nonetheless, that alternative duty does exist in most cases, and it will be the job for the trier of fact to determine whether under the circumstances involved, the signer was negligent in failing to fulfill this duty. To determine his negligence, the following circumstances should be considered relevant: For one, the presence or absence of any third person who might be called upon to read and explain the instrument to him; secondly, the apparent necessity to act without delay and the consequential lack of time to comply with the duty; a third very important consideration is whether any representations were made concerning the contents of the writing and the identity of the person making them. Obviously, if no representations are made, then the illiterate person's conduct in failing to obtain a reading could be considered inexcusable, since he is entering into a written agreement without any knowledge of its terms.³¹ This in fact would tend to border on reckless conduct.

On the other hand, if the opposing party or a third person had discussed the contents of the writing and the one unable to read had a justifiable right to rely on this person he would generally not be held negligent in failing to have the contract read to him verbatim.³² In *Grimsley v. Singletary*,³³ the court described their exception to the rule that failure to discover the meaning of a contract's language is negligence:

He (the illiterate) may ordinarily rely upon representation of the other party as to what the instrument is or as to what it contains; and his mere failure to request the other party or some one [sic] else to read it to him will not generally be such negligence as will make the instrument binding upon him.³⁴

The *Grimsley* court seemed to hold that when the representations are made by the opposing party, the illiterate party can justifiably rely even in the absence of a confidential relationship. Many courts, however, apply a stricter rule of justifiable reliance than the *Grimsley* court.³⁵

31. *Robertson v. Panlos*, 208 Ga. 116, 65 S.E.2d 400 (1951); *Smith v. Agan*, 111 Ga. App. 536, 142 S.E.2d 291 (1965).

32. *Cole v. Cates*, 113 Ga. App. 540, 149 S.E.2d 165 (1966).

33. 133 Ga. 56, 65 S.E. 92 (1909).

34. *Id.* at 58, 65 S.E. at 93.

35. See, e.g., *Sutherland v. Sutherland*, 187 Kan. 599, 358 P.2d 776 (1961). (The Supreme Court of Kansas held that the illiterate's failure

Some courts have taken the duty of due care off of the person unable to read, and in place of it have required the other party to read and fully inform the illiterate party of the nature of the instrument.³⁶ Of course, before this affirmative duty could apply the other party would have to be aware of the illiterate's handicap.³⁷ In this setting the relationship of the estoppel and negligence principles becomes evident. By signing a contract, a person manifests his assent and the other party thus believes the former has knowledge of and is agreeing to all the terms and the latter thereby relies.³⁸ Negligence is also related to this theory of estoppel in that a person failing to ascertain the terms of the contract may be negligent and thereby be estopped from avoiding it on the ground of not understanding its provisions. His negligence is what has misled the other party into believing he understood the writing. It logically follows that if one party is aware of the other's illiteracy then the estoppel principle would have no application because he would not be misled. Professors Corbin and Williston both concur with regard to this.³⁹ In this case the illiterate party could only be held because of his negligence. Thus, it can be seen that even though the two theories are interrelated, they can operate independently in the formation of a contract under the objective theory.

FORMATION OF CONTRACTS IN CALIFORNIA

A contract is indeed the result of objective manifestations of the parties. If those manifestations are sufficient, the parties' subjective intentions or beliefs are wholly immaterial.⁴⁰

This, the objective theory, is not without competition in California, for many California courts use language indicating that a "meeting of the minds" is necessary for a valid contract.⁴¹ By statute, California defines mutual consent as the parties all agreeing "upon the same thing in the same sense."⁴² This requirement is limited by further language in the statute indicating that in inter-

to procure a reliable person to read and explain the instrument to him constituted gross negligence.)

36. *Spitze v. Baltimore & O.R.R.*, 75 Md. 162, 23 A. 307 (1892); *Miller v. Spokane Int'l Ry.*, 82 Wash. 170, 143 P. 981 (1914).

37. *Id.*

38. See *Phelps*, *supra* note 15.

39. See A. CORBIN, *supra* note 1, at § 107; S. WILLISTON, *supra* note 10, at § 35.

40. *Fowler v. Security-First Nat'l Bank*, 146 Cal. App. 2d 37, 47, 303 P.2d 565, 571 (1956).

41. See, e.g., *Bowman v. Victor*, 83 Cal. App. 2d 693, 189 P.2d 876 (1948).

42. CAL. CIV. CODE § 1580 (West 1954).

pretation of contracts, unexpressed intentions are immaterial.⁴³ Many California courts seem to have utilized this limitation in construing this code section as not requiring a meeting of the minds in the formation as well as interpretation of contracts.⁴⁴ A distinction should be drawn, however, with respect to formation and interpretation. Obviously, if the legislature thought that unexpressed intentions were not relevant, they would not have added the limitation as to interpretation since by so doing they implicitly recognized that intent is otherwise pertinent as to the formation of a contract. A relatively recent Federal case held that under California law, to create a valid contract the minds of the parties must meet and agree to the same thing.⁴⁵ Since the language used was similar to the applicable statutory language ("Consent is not mutual, unless the parties all agree upon the same thing in the same sense."⁴⁶) this can be construed as a contrary interpretation of this statute. In 1872, when this statute was enacted, the subjective theory of contract formation was the rule rather than the exception. Thus, it can be reasonably assumed that the legislature intended this statutory section to express this theory. The objective theory has since become the predominant rule, however, and courts have accordingly construed this statute as a codification thereof. So, notwithstanding cases to the contrary, the majority rule in California is the objective theory of contract. The landmark case in this area is *Brant v. California Dairies, Inc.*,⁴⁷ and this decision has been heavily followed.⁴⁸

In *Smith v. Occidental Steamship Co.*,⁴⁹ the Supreme Court of California outlined the law of contractual liability where one is ignorant of the terms of the particular written contract.

The general rule is that when a person with the *capacity of reading* and understanding an instrument signs it, he is, in the ab-

43. *Id.*, see also CAL. CIV. CODE § 1636 (West 1973).

44. See, e.g., *Leo. F. Piazza Paving Co. v. Bebek & Brkich*, 141 Cal. App. 2d 226, 296 P.2d 368 (1956).

45. *Deering-Milliken Inc. v. Modern-Aire*, 231 F.2d 623.

46. CAL. CIV. CODE § 1580 (West 1954).

47. 4 Cal. 2d 128, 48 P.2d 13 (1935).

48. See, e.g., *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 101 Cal. Rptr. 347 (1972), where the court held that one can be bound to a contract as a result of his outward manifestations (conduct) notwithstanding his lack of knowledge of all the terms.

49. 99 Cal. 462, 34 P. 84 (1893).

sence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding; but it is also a general rule that the assent of a party to a contract is necessary in order that it be binding upon him, and that, if the circumstances of a transaction are such that he is not estopped from setting up his want of assent, he can be relieved from the effect of his signature if it can be made to appear that he did not in reality assent to it.⁵⁰

It could be interpreted from the court's language that this general rule would only seem to apply when a person had the capacity to read, and even in such a case the court recognized that there would be exceptions to one's being bound by a signed contract. It is thus reasonable to imply that a less strict standard would apply to a person unable to read, and this has been the interpretation of the rule in California.

Therefore, notwithstanding the cases that hold a person is presumed to have assented to all the provisions of a writing which he signs⁵¹ or that a person is presumed to have knowledge and understanding of the unambiguous language in a contract,⁵² exceptions have evolved in California for persons illiterate or otherwise unable to read the contract.

In California, failure to have the contract read is not considered negligence *per se*.⁵³ As in many other states,⁵⁴ the issue as to negligence is one for the trier of fact to resolve.⁵⁵ If the failure to have the document read to him is induced by or caused by the other party to the contract, the duty of care imposed on the illiterate person will necessarily be less.⁵⁶ Furthermore, if the contents are misread or misrepresented to the illiterate person by the opposing party, the California rule does not require the showing of a confidential relationship before an explanation as to his failure to have it read by another will be allowed.⁵⁷ This would seem to make the presumption of assent and knowledge attributable to one signing a contract a rebuttable one in California.

50. *Id.* at 470-71, 34 P. at 86-87 (emphasis added).

51. *Eldridge v. Mowry*, 24 Cal. App. 183, 140 P. 978 (1914).

52. *Roller v. California Pacific Title Ins. Co.*, 92 Cal. App. 2d 149, 206 P.2d 694 (1949).

53. *CIT Corp. v. Panac*, 25 Cal. 2d 547, 154 P.2d 710 (1946).

54. *See, e.g., Davis v. Davis*, 256 N.C. 468, 124 S.E.2d 130 (1962); *Gaines v. Jordan*, 64 Wash. 2d 661, 393 P.2d 629 (1964); cf. *Pimpinello v. Swift & Co.*, 253 N.Y. 159, 170 N.E. 530 (1930) where failure of illiterate to procure someone to read the instrument to him was held to be negligence as a matter of law.

55. *Wright v. Lowe*, 140 Cal. App. 2d 891, 296 P.2d 34 (1956).

56. As to what is sufficient inducement, see text accompanying notes 92-94 *infra*.

57. *Sidebotham v. Robison*, 216 F.2d 816 (9th Cir. 1954).

PART II

When someone, illiterate in English, has entered into a disadvantageous written contract, his counsel's first thought should be if and how he can avoid liability. This article now discusses the various avenues open to him in pursuit of this objective.

Lack of Mutual Consent

When a person unfamiliar with the alien language of a contract is *fraudulently* induced to sign without knowledge of its terms, courts can and do void the contract on the basis of lack of mutual consent.⁵⁸ Because there are cases where the lack of mutual consent has been used to defeat a contract in *absence of fraud*, cases involving fraud will be discussed in the following section. Cases dealing with the absence of fraud will be taken up at this juncture.

When one is confronted with a contract that he has entered into, and fraud is not present, one line of attack is that no assent to the contract exists since there was no knowledge or basic understanding of its terms. In *Skym v. Weske Consolidated Co.*,⁵⁹ one of the contracting parties could neither read nor write. A third person, not a party to the contract, read the contract to the illiterate and made "running comments" during the course of the reading. After this, the writing was signed on behalf of the illiterate party. The court held the contract void due to lack of mutual assent. The explanation given by the court was that the person unable to read had not meant to assent to the contract as actually written, but to what he thought the contract contained, which included the third party's comments during the reading.⁶⁰

In *Wetzstein v. Thomasson*,⁶¹ the instrument was read verbatim to the party unable to read by the other party. Even so, the court held that there was not actual consent to the agreement because there had been no explanation of the contract's full legal effect.⁶²

58. *Mairo v. Yellow Cab Co.*, 208 Cal. 350, 281 P. 66 (1929).

59. 5 Cal. Unrep. 551, 47 P. 116 (1896).

60. *Id.* at —, 47 P. at 118.

61. 34 Cal. App. 2d 554, 93 P.2d 1028 (1939).

62. *Id.* at 559, 93 P.2d at 1036. An interesting question in regard to this case is if the person could have read the contract and did so, but still was not aware of the contract's full legal effect, would the court still have held the instrument void?

In the case of *Raynale v. Yellow Cab*,⁶³ an injured person was submitted a liability release⁶⁴ by a representative of the defendant. Due to her injuries the plaintiff was not able to read, and all that was discussed orally was damage to her coat. The court held that notwithstanding the writing which purported to be a release from *all* liability, the release only covered damage to the coat and did not release defendant from liability for any personal injuries suffered by the plaintiff. The court's basis for the ruling was that the boundaries of mutual intent were limited to the discussion regarding the coat.⁶⁵

In both *Skym* and *Wetzstein*, the documents in question were read to the illiterate party, so any negligence for failure to obtain such a reading was not at issue. In *Raynale*, even though not read, the document was discussed so the court could have followed the principle that the person had a right to rely on representations of the opposing party.⁶⁶ In all three cases, the opposing party knew of the other's inability to read the contract either because of illiteracy or injuries, and hence the estoppel principle had no application.

A landmark California case in this area of mutual assent is *Meyer v. Haas*.⁶⁷ Although *Meyer* did involve fraud and will be discussed in the subsequent section, its importance requires an examination of it at this time. In *Meyer*, the plaintiff was a German who was unable to read English. The plaintiff signed an agreement that purportedly released the defendant from all liability for injuries suffered by plaintiff due to the defendant's negligence. The release was not read to the plaintiff nor was he informed of its contents. The plaintiff executed the agreement under the mistaken belief, induced by the deception of the defendant, that the release was only effective as to a claim he had for loss of time from em-

63. 115 Cal. App. 90, 300 P. 991 (1931).

64. Releases are to be treated the same as other contracts with respect to *mutual assent* and *rescission*. *Matthews v. Atchison Topeka & Santa Fe Ry.*, 54 Cal. App. 2d 549, 129 P.2d 435 (1942). There are, however, special rules applicable to releases executed for personal injuries unknown at the time of the signing of the release. *Casey v. Proctor*, 59 Cal. 2d 97, 378 P.2d 579, 28 Cal. Rptr. 307 (1963). Briefly, the rule is that for release of the unknown claim or claims to be binding, evidence must be produced to show that the parties intended the release to have such effect. CAL. CIV. CODE § 1542 (West 1954). See also CAL. CIV. CODE § 1541 (West 1954) for the rule that a release can be valid absent new consideration if the release is in writing. (It is also important to remember that a strong public policy is prevalent in a release situation, thus, the courts will be more motivated to find the contract void than if dealing with a normal commercial transaction.)

65. 115 Cal. App. at 92, 300 P. at 991.

66. See text accompanying notes 33-35 *supra*, 89-91 *infra*.

67. 126 Cal. 560, 58 P. 1042 (1899).

ployment. The court held void the portion of the contract that released the defendant from all liability, but valid as to the claim for loss of employment. In effect, the court's ruling was that Mr. Meyer was bound to the agreement only to the extent that he had intended to be.⁶⁸

The court also ruled that the plaintiff would not have to return any money received from the defendant for the reason ". . . that the plaintiff in this case is not attempting to avoid a contract which he has made, but is showing that he did not make the contract which he apparently made."⁶⁹ As will be discussed *infra*,⁷⁰ a prerequisite to rescission of a contract in California is a restoration of the consideration received from the other party.⁷¹ In *Meyer* the contract was not rescinded but held to be partially void *ab initio*, which did away with the duty to comply with this requirement.

From these cases it is evident that if a person can avoid the estoppel and negligence problems a contract can be voided merely for lack of mutual assent. To accomplish this it must be shown that he was not negligent in failing to have the contract read or, in the alternative, that his negligence has not misled the other party. Either of these situations would tend to furnish relief.⁷² It should also be kept in mind that even where there is a reading of the contract, under the right circumstances a court may still hold that mutual assent is lacking.

Fraud

This discussion is limited to fraud in regard to the contents of a writing—intrinsic fraud or fraud in the execution—and that does not include fraud with reference to some collateral fact or promise—extrinsic fraud or fraud in the inducement. The obvious reason is that the inability to read is the *sine qua non* of misrepresentations of a writing's character or contents while collateral matters can be fraudulently represented to learned as well as to illiterate people. This article is only concerned with the former and their

68. *Id.* at 563, 58 P. at 1043.

69. *Id.*

70. See text at note 96, *infra*.

71. CAL. CIV. CODE § 1691 (West 1973).

72. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441 (1929).

particular problems in the law of contracts. In fact, the courts tend to limit the use of intrinsic fraud to avoid a contract to illiterate persons since they are really the most susceptible ones to a fraudulent misrepresentation of the contents of a writing.⁷³

While ordinarily one is charged with knowledge of the terms of a writing which he executes, there is an exception (in addition to those already enumerated) where fraud⁷⁴ taints a material part of the transaction. Therefore where one party induces the signature of another by misrepresenting the contents of the writing, the defrauded party can avoid the contract if his reliance on the other party was justified.⁷⁵ This latter requirement is required to free the illiterate person from a charge of negligence.

Avoidance of the contract, however, is only one of the remedies open to a defrauded party. Instead of seeking rescission and repudiation of the contract, the defrauded party may elect to affirm the contract and sue for damages in an action for deceit.⁷⁶ Another choice open is the use of the fraud as a defense in an action on the written contract brought by the party guilty of the fraud.⁷⁷ Reformation of the contract would be another remedy available if the parties had arrived at an oral agreement and due to the fraud of

73. *Ford Motor Co. v. Pearson*, 40 F.2d 858 (9th Cir. 1930).

74. "A fraudulent misrepresentation is one made with the knowledge that it is or may be untrue, and with the intention that the person to whom it is made act in reliance thereon." *Seeger v. Odell*, 18 Cal. 2d 409, 414, 115 P.2d 977, 980 (1941). There are two types of fraud, actual or constructive, recognized by statute in California. CAL. CIV. CODE § 1571 (West 1954). CAL. CIV. CODE § 1572 (West 1954) defines actual fraud as consisting

[i]n any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or
5. Any other act fitted to deceive.

CAL. CIV. CODE § 1573 (West 1954) defines constructive fraud as:

. . . Any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or,
2. . . . Any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

75. *Security First Nat'l Bank v. Earp*, 19 Cal. 2d 774, 122 P.2d 900 (1942). As to what constitutes justifiable reliance, see text accompanying 87-91 *infra*.

76. *Paolini v. Sulprizio*, 201 Cal. 683, 258 P. 380 (1927).

77. *Id.* This remedy has been termed "defensive relief."

one of the parties the subsequent writing is inconsistent with the prior oral agreement.⁷⁸

Regardless of which remedy is elected, the fraud must be shown to exist by clear and convincing evidence.⁷⁹ The presumption that lies in favor of honesty and fair dealing necessitates the degree of proof.⁸⁰ However, where a confidential relationship exists between the parties, and an undue advantage has been gained by one, then a presumption of fraud is said to exist,⁸¹ and would therefore switch the burden of proof.

Rescinding⁸² or Voiding the Contract

As discussed *supra*,⁸³ a person's inability to read does not excuse him from exercising due diligence with respect to written agreements.⁸⁴ Nevertheless, while it is a general rule that a person, if unable to read a contract, is under a duty to obtain the services of another to read it to him,⁸⁵ the duty is excused where failure to comply is a result of the other party's fraud.⁸⁶

78. See 12 S. WILLISTON, *supra* note 10, at § 1525(a).

79. *Maslow v. Maslow*, 117 Cal. App. 2d 237, 255 P.2d 65 (1953). This requirement, however, is one for the trial court and not the court on appeal. The appeals court will be governed by the general rule that if the evidence is sufficient to support the finding the decision will not be disturbed. *Refinance Corp. v. Northern Lumber Sales, Inc.*, 163 Cal. App. 2d 73, 329 P.2d 109 (1958). Note that this requirement of clear and convincing evidence is not to be confused with a preponderance of the evidence; the burden of proof required. Only a preponderance of evidence is necessary to prove fraud, the additional burden of clear and convincing evidence is necessary to overcome the presumption against fraud. *Bell v. Graham*, 105 Cal. App. 2d 765, 234 P.2d 158 (1951), and see text accompanying notes 80-82 *infra*.

80. *Shapiro v. Equitable Life Assurance Soc'y of the United States*, 76 Cal. App. 2d 75, 172 P.2d 725 (1946).

81. *Solon v. Lichtenstein*, 39 Cal. 2d 75, 244 P.2d 907 (1952).

82. CAL. CIV. CODE § 1689 (West 1973) states in relevant part:

(b) A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

83. See text accompanying notes 24-28 *supra*.

84. *Hawkins v. Hawkins*, 50 Cal. 558 (1875).

85. *Dale v. Dale*, 87 Cal. App. 359, 262 P. 339 (1927).

86. *Fleury v. Ramacciotti*, 8 Cal. 2d 660, 67 P.2d 339 (1937).

In *Gajanich v. Gregory*,⁸⁷ this exception was described in the following manner:

It is the general rule that a person who executes a contract is charged with knowledge of all its provisions where he had the means of such knowledge and of which he negligently deprived himself [citations omitted] and it has been held that the fact that he is illiterate does not change the rule [citation omitted]. But where a fiduciary relation exists, and as a result a person is fraudulently induced to execute a contract in the reasonable belief that he is signing something else, a different rule applies and the instrument is void *ab initio* [citation omitted]. The latter rule has been applied in numerous instances where due to illiteracy or a weak mental condition, persons who were unable to comprehend the effect of their acts were induced to execute releases and other contracts [citations omitted].⁸⁸

The *Gajanich* court spoke of a "fiduciary relationship";⁸⁹ however, more recent cases have abrogated this requirement.⁹⁰ This is not to say that a justifiable right to rely on the representations is not now required, but whether the right to rely is justified will depend on the facts and circumstances of each case.⁹¹ Where the *other party* is guilty of the fraudulent misrepresentation a right to rely thereon is justifiable and relief is usually granted. The apparent policy behind this rule would seem to be that where the other party induces the defrauded one not to read the contract by misrepresenting the contents, it would be inconsistent to allow the fraudulent party to use the illiterate's negligence as a bar to the latter's relief.

A distinction can possibly be made as to whether the fraud was the actual cause of failure to learn the contents or whether fraud was simply present in the transaction. In *Mazuran v. Stefanich*,⁹² it was held that where one signs a contract before ascertaining its contents, because of the fraudulently induced belief that the terms are different from those actually set out in the writing, the court will void the transaction even in the absence of a confidential relationship; while in *Daily Telegram Co. v. Long Beach Press Publishing Co.*,⁹³ the court seemed to imply that the fraud itself must be the cause when it said:

87. 116 Cal. App. 622, 3 P.2d 389 (1931).

88. *Id.* at 633, 3 P.2d at 393-94.

89. Fiduciary relationship which in law is synonymous with a confidential relationship, exists ". . . whenever trust and confidence is reposed by one person in the integrity and fidelity of another." *Stevens v. Marco*, 147 Cal. App. 357, 372, 305 P.2d 669, 678 (1956).

90. *See, e.g.*, 214 Cal. 619, 7 P.2d 297; *Daily Telegram Co. v. Long Beach Press Publishing Co.*, 133 Cal. App. 140, 23 P.2d 833 (1933).

91. *California Trust Co. v. Cohn*, 214 Cal. 619, 7 P.2d 297 (1932).

92. 95 Cal. App. 327, 272 P. 772 (1928).

93. 133 Cal. App. 140, 23 P.2d 833.

A man may perhaps be able to discover for himself what he ought to know if left to his own devices, but where he is induced by the artifice of another not to use his opportunities it would seem hardly fair that the one using the trick or misrepresentation should remain protected.⁹⁴

If the misrepresentations are to the contents then this would always be the inducing factor that produces the failure to ascertain the true facts in the contract, and therefore the two cases can be reconciled on this ground.

For a party to successfully attack a contract due to fraudulent misrepresentations of its contents, there must of course be such misrepresentations. Thus, where the opposing party does not represent the contents in any manner, in the absence of a duty to disclose, the other party could not rely on an action for fraud to have the contract set aside.⁹⁵ The obvious rationale is that if a misconception in this situation does exist, it can be attributed solely to the other person's failure to have the contract read to him.

California has a statutory rule that requires a party to restore any consideration as a prerequisite to that party's action to rescind a contract.⁹⁶ If reformation instead of rescission is sought, however, this requirement does not exist.

Reformation of the Contract

When a person has entered into a favorable oral agreement, but the subsequent written agreement fails to accurately portray the prior agreement, then he may want to reform the written instrument in order to retain the fruits of his original bargain instead of rescinding it. The California Civil Code permits reformation for mutual mistake of the parties, unilateral mistake of which the other party has knowledge, and *fraud*.⁹⁷

94. *Id.* at 145, 23 P.2d at 835.

95. *Muncy v. Thompson*, 26 Cal. App. 634, 147 P. 1178 (1915).

96. CAL. CIV. CODE § 1691 (West 1973).

97. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

CAL. CIV. CODE § 3399 (West 1970).

The same general rule applies that if a person is negligent in failing to have the contract read, reformation will be denied.⁹⁸ Where the failure to ascertain the contents is caused by fraudulent misrepresentations of the other party that the terms are different from those actually embodied in the writing, the illiterate party is not barred from relief by his negligence and the court will grant reformation.⁹⁹ No requirement of a confidential or fiduciary relation exists where reformation for fraud is sought.¹⁰⁰ Before reformation is granted the fraud must be shown by clear and convincing evidence.¹⁰¹ There is a presumption that parties intend to make an equitable agreement, and one seeking reformation is entitled to the use of this presumption.¹⁰²

It has been held that a void instrument is subject to neither reformation¹⁰³ nor ratification.¹⁰⁴ In order to determine what is required before a contract will be rendered void in California, an examination of applicable cases is necessary.

In *Mairo v. Yellow Cab Co.*,¹⁰⁵ the plaintiff, a Russian who was unable to read English, had been injured by the defendant cab company, and in an attempt to secure a release from liability the defendant's representative employed a release written in English which would release defendant from all liability in exchange for a sum of money. The court, in reversing a directed verdict for the defendant, held that if the true character of the release was misrepresented to the plaintiff in such a manner that he did not in actuality know what he was signing then it was void.¹⁰⁶ It should be recognized that in this case the misrepresentation went to the very nature of the instrument instead of its contents.

In *Meyer v. Haas*,¹⁰⁷ the plaintiff signed a release under a misconception as to its contents, thinking that the release was only for lost time. Because of fraudulent misrepresentations by the defendant's agent, he did not know that the writing was also a release of all claims for personal injuries. The court held the release void,

98. *Tomas v. Vaughn*, 63 Cal. App. 2d 188, 146 P.2d 499 (1944).

99. *Id.* Note that the illiterate would not be considered negligent if he had a right to rely on the representations of the other party.

100. *Johnson v. Sun Realty Co.*, 138 Cal. App. 296, 32 P.2d 393 (1934).

101. See text accompanying notes 79-80 *supra*.

102. CAL. CIV. CODE § 3400 (West 1970).

103. *Douglass v. Dahm*, 101 Cal. App. 2d 125, 224 P.2d 914 (1950).

104. *Hakes Inv. Co. v. Lyons*, 166 Cal. 557, 137 P. 911 (1913).

105. 208 Cal. 350, 281 P. 66 (1929).

106. *Id.* at 352, 281 P. at 67.

107. 126 Cal. 560, 58 P. 1042; see also text accompanying notes 67-71 *supra*.

and distinguished fraud in the factum from fraud in the execution.

In those cases generally the parties sought to avoid or rescind contracts, the nature and contents of which they understood correctly, but they had been led to execute them by fraud or deception as to something other than the contents of the contract; and in such a case the contract would not be void but only voidable, and the rule requiring a return of everything received on the faith of the contract before it could be rescinded or avoided would apply; but this rule as to a return of everything received does not apply where a party is tricked or deceived into signing a contract different in its terms and objects from the contract which he has made and which he understands that he is executing. The contract under such circumstances will be held to be what the maker of it intended it should be, and not what it was made to appear to be by the deception practices.¹⁰⁸

A case that attempted to distinguish *Meyer* in relation to this void/voidable distinction was *Garcia v. California Truck Co.*¹⁰⁹ In *Garcia* the plaintiff was misled to believe that there was a provision in the release that promised him future employment as part of the consideration. The court in holding the release *voidable* instead of *void* said:

But the doctrine of *Meyer v. Haas*, . . . , has no application where the party releasing thoroughly understood that the release he was executing was what it purports to be, a release of the very cause of action he seeks to enforce by action, notwithstanding a misconception on his part induced by fraud as to some other statements in the writing.¹¹⁰

It would seem that if a person is misinformed as to certain statements in the writing, the contract would be void not voidable, as to these misconceived statements, and if material to the contract the misrepresentation should render the entire agreement void. Fraud in the execution, which renders a contract void, exists when an instrument is signed under a mistaken belief as to its contents or total identity due to fraud.¹¹¹ Section 1566 of the California Civil Code, however, would seem to be a statutory attempt to change this common law rule. This section states in pertinent part:

108. *Id.* at 563, 58 P. at 1043.

109. 183 Cal. 767, 192 P. 708 (1920).

110. *Id.* at 770-71, 192 P. at 710.

111. See, Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CALIF. L. REV. 877, 888 (1961).

A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties, in the manner prescribed by the Chapter on Rescission.¹¹²

As mentioned *supra*,¹¹³ the chapter of rescission contains a provision that requires a return of all consideration received as a prerequisite to rescission. If a person were unable to comply with this then he would be relegated to an action for reformation or damages due to deceit if the court did not hold the contract void. Moreover, the Uniform Commercial Code's protection to a holder in due course from personal defenses has no application when fraud in the execution is present and the contract is held void.¹¹⁴ It can be seen, therefore, that it is important whether the court holds the contract void or merely voidable.

Notwithstanding the statutory language of Section 1566, courts have made the distinction between fraud in the inducement and fraud in the execution, and have held contracts procured by the latter void.¹¹⁵ Fraud in the execution has been held to exist in California where there is a misunderstanding as to the nature or contents of the contract.¹¹⁶ Of course, holding the contract void

112. CAL. CIV. CODE § 1566 (West 1954).

113. See text at note 96 *supra*.

114. UNIFORM COMMERCIAL CODE § 3-305 states in pertinent part:

To the extent that a holder is a holder in due course he takes the instrument free from

(2) All defenses of any party to the instrument with whom the holder has not dealt *except*

(c) Such misrepresentation as has induced the party to *sign* the instrument with *neither knowledge* nor reasonable opportunity to obtain knowledge of its character or its *essential terms*. . . . (emphasis added).

See also CAL. COMM. CODE § 3305 (West 1964). This section clearly indicates that misrepresentation of the essential terms of the instrument would render it void so long as the illiterate party satisfies the other requirements outlined in this article, e.g. justifiable reliance. But cf. CAL. CIV. CODE § 1804.2 (West 1973) which provides that:

[a]n assignee of the seller's rights is subject to all equities and defenses of the buyer against the seller arising out of the sale and existing in favor of the buyer at the time of the assignment, notwithstanding an agreement to the contrary, but the assignee's liability may not exceed the amount of the debt owing to the assignee at the time that notice of equities and defenses is given to the assignee.

This section would seem to deny holder in due course status to an assignee of a retail installment sales contract, thereby rendering the distinction between fraud in the execution or inducement and the void or voidable nature of the resulting contract merely an academic question in these situations. See Warren, *Comments on Vasques v. Superior Court*, 18 U.C.L.A. L. REV. 1065 (1971) for a discussion of Section 1804.2.

115. 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 322 (8th ed. 1973).

116. *City of Oakland v. California Constr. Co.*, 15 Cal. 2d 573, 104 P.2d 30 (1940).

can be disadvantageous as well as advantageous to the defrauded party. If the contract is held void *ab initio*, he will not be required to return the consideration received; however, neither will he be allowed to ratify the contract and sue for damages for deceit because, as seen *supra*,¹¹⁷ a void contract cannot be ratified.

When the party signing the contract is held to be negligent in failing to learn the contents of the writing prior to signing, the Restatement of Contracts provides for the utilization of the void/voidable distinction in a peculiar manner. The Restatement position is that if one signs a contract under a mistake as to its contents as a result of the fraud of the other party, the contract is void unless the signer was negligent. If the latter situation is present, the contract becomes merely voidable.¹¹⁸

The case of *Security First-Nat'l Bank v. Earp*¹¹⁹ aptly demonstrates the judicial confusion regarding this issue in California. In *Earp*, the fraud involved went to the contents of the instrument; i.e., fraud in the execution which should result in the instrument being void. The defrauded party prayed for this relief and the trial court granted it. However, on appeal the California Supreme Court, while affirming, discussed rescission and the duty of restitution, obviously not realizing that it is impossible to rescind a void instrument!¹²⁰

This uncertainty in California can be resolved in a manner that would conform to the common law rule, despite the statutory section. The applicable statute, Section 1566 of the Civil Code, does render a contract voidable rather than void when consent is not freely given.¹²¹ For example, if a person was induced to sign a contract through a misrepresentation of some collateral matter, the consent is considered not freely given because induced by fraud. Where the fraud, however, goes to the very contents or nature of the written contract, there is in fact no consent given, free or otherwise. Therefore, when the fraud prevents, due to lack of consent,

117. See text at note 104 *supra*.

118. RESTATEMENT OF CONTRACTS § 475, Illustration 2 (1932).

119. 19 Cal. 2d 774, 122 P.2d 900 (1942).

120. B. WITKIN, *supra* note 115, at § 686.

121. CAL. CIV. CODE § 1566 (West 1954); see text accompanying notes 111-112 *supra*.

a meeting of the minds, California Civil Code Section 1566 would not be applicable and the contract should be held void.

*Action for Deceit*¹²²

As can be seen, an action for deceit would be an important remedy to a party who is in a position where rescission would not afford adequate relief. For example, if a person were unable to return what he had received as consideration he would be precluded from rescinding the contract, but he could still elect to affirm the contract, retain the consideration, and sue for damages for deceit.

In the majority of jurisdictions,¹²³ the measure of damages in an action for deceit is governed by the "benefit of the bargain" rule. Under this rule the complaining party is entitled to recover the difference between the actual value of the property as received and the value as represented.¹²⁴ California, however, by statute limits the measure of recovery to actual out-of-pocket damages suffered by the plaintiff.¹²⁵ This rule is appropriately named the "out-of-pocket" rule, and recovery under it is the difference between the value parted with and the value that he has actually received, plus any additional damage arising from the transaction.¹²⁶ This latter element clearly allows consequential damage,¹²⁷ and if a fraudulent intent can be proved, exemplary damages are recoverable.¹²⁸

Notwithstanding this general California rule, in *Morris v. Harbor Boat Building Co.*,¹²⁹ the Second District Court of Appeal applied

122. The California Supreme Court has outlined the necessary elements of action for deceit in the following manner:

In general, to establish a cause of action for fraud or deceit plaintiff must prove that a material representation was made; that it was false; that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true; that it was made with an intent to induce plaintiff to act in reliance thereon; that plaintiff reasonably believed it to be true; that it was relied on by plaintiff; and that plaintiff suffered damage thereby.

Hobart v. Hobart Estate Co., 26 Cal. 2d 412, 422, 159 P.2d 958, 964 (1945).

123. See W. PROSSER, *LAW OF TORTS* 734 (4th ed. 1971), and authorities cited therein.

124. *Id.*

125. CAL. CIV. CODE § 3343 (West Supp. 1973) (this section is limited to fraud in the sale, purchase, or exchange of personal or real property.) Note the measure of damages for fraud in a sale covered by the Uniform Commercial Code would be the "benefit of the bargain" rule. CAL. COMM. CODE § 2721, CALIFORNIA COMMENT 1 (West 1964).

126. *Id.*

127. *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954).

128. CAL. CIV. CODE § 3294 (West 1970).

129. 112 Cal. App. 2d 882, 247 P.2d 589 (1952).

the benefit of the bargain rule and ruled the damages to be the difference between what the buyer received and what he had the right to expect to receive.¹³⁰ The *Morris* court also allowed the introduction of parol evidence to establish the fraud and commented:

Obviously, it would amount to a direct and complete contradiction to affirm in one breath that a defrauded buyer has the legal right to bring such an action, and then in the next breath to cancel such remedy by quoting the parol evidence rule and excluding the only type of evidence by which fraud could be established.¹³¹

The parol evidence rule ordinarily is not a problem when due to fraud a contract is being challenged. The parol evidence rule is simply a tool to prevent the introduction of oral evidence to contradict or vary the terms of a written contract.¹³² Therefore, unless a contract is valid and in effect, the parol evidence rule would not apply, and evidence that goes to prove that consent has been obtained by fraud or that no consent exists due to fraud, establishes the invalidity of the contract.¹³³ Thus the parol evidence would not be varying or contradicting the terms of the contract, since it is proving that there is no contract in force to vary or contradict.¹³⁴ California's parol evidence rule is embodied in a statute which explicitly provides for the introduction of parol evidence to prove fraud.¹³⁵

Even in the presence of this clear statutory language, courts in California have constantly disagreed as to the admissibility of parol evidence to show fraud.¹³⁶ The disagreement began with the holding in *Bank of America Nat'l Trust & Sav. Assn. v. Pendergrass*.¹³⁷ In that case the court made the following distinctions with respect to fraudulent promises: evidence of promises which contradict or vary the terms of the writing were held to be inadmissible even for the purpose of proving fraud; however, evidence

130. *Id.* at 889, 247 P.2d at 593. Note that this case was handed down (1952) prior to adoption of § 2721 of the California Commercial Code (1963), see note 125 *supra*.

131. *Id.*

132. RESTATEMENT OF CONTRACTS § 238 (1932).

133. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 221 (1954).

134. *Cobbs v. Cobbs*, 53 Cal. App. 2d 780, 128 P.2d 373 (1942).

135. CAL. CIV. PRO. CODE § 1856 (West 1955).

136. See Sweet, *supra* note 111, and cases cited therein.

137. 4 Cal. 2d 258, 48 P.2d 659 (1935).

of promises that were consistent with or which pertained to a matter not contained in the writing were held to be admissible to prove fraud.¹³⁸ This dubious distinction, though followed by many courts,¹³⁹ has received much criticism.¹⁴⁰ Regardless of the desirability of the rule, how does its application affect persons who have been fraudulently induced to enter into written contracts under a mistaken belief that its terms are different than they actually are?

It can be stated with reasonable certainty that the rule in *Pendergrass* will not prevent these defrauded parties from utilizing parol evidence as a means of proof. Several reasons can be advanced to justify this conclusion. First, in *Fernald v. Lawsten*,¹⁴¹ the court held that when execution of an instrument is procured by fraud, proof of the fraud is always provable by parol evidence. It is to be noted that this case was decided after *Pendergrass*, which shows that *Pendergrass* is not uniformly followed in California. Another reason is the distinction to be made between misrepresentations of existing facts, and the making of a fraudulent promise.¹⁴² The rule in *Pendergrass* was held to apply only to fraudulent promises, and when one is misled as to the contents of a writing this would be classified as a misrepresentation of a material fact, namely the contents of the writing. A case following this line of reasoning and allowing the introduction of parol evidence to show fraud when one party signed without reading the instrument was *Hamrick v. Acme Cigarette Service*.¹⁴³ In that case one party was misled as to the contents of the writing, and the court allowed parol evidence in to establish the fraud.

Adhesion Contracts and Unconscionability

When one is confronted with a situation where fraud is not provable nor is a lack of mutual consent present, the doctrines of adhesion contracts and unconscionability can be utilized.

138. *Id.* at 263, 48 P.2d at 662.

139. *See, e.g.,* *Simmons v. Cal. Institute of Technology*, 34 Cal. 2d 264, 209 P.2d 581 (1949); *Newmark v. H. & H. Products Mfg. Co.*, 128 Cal. App. 2d 35, 274 P.2d 702 (1954).

140. *See Sweet, supra* note 111; Note, *Parol Evidence: Admissibility to Show that a Promise was Made without Intention to Perform it*, 38 CALIF. L. REV. 535 (1950); *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30 (1971).

141. 26 Cal. App. 2d 552, 79 P.2d 742 (1938).

142. For purposes of this distinction, a fraudulent promise can be defined as one made without any intention of performing it.

143. 164 Cal. App. 2d 340, 330 P.2d 419 (1958).

If the person has entered into an adhesion contract, he will be able to allege lack of mutual assent as determined under a different standard than used where the contract terms are actually a product of bargaining between the parties. Adhesion contracts have been defined by the California Supreme Court as:

. . . [A] standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a 'take it or leave it' basis, without opportunity for bargaining and under such conditions that the 'adherer' cannot obtain the desired product or service save by acquiescing in the form agreement.¹⁴⁴

Courts have become reluctant to enforce adhesion contracts, citing the policy that where one party signs a form document he will very likely have little knowledge of its terms.¹⁴⁵ Thus his real consent, or for that matter objective consent, will oftentimes be absent.

When one contracting party who has drafted a long, complex contract presents it to the other party for acceptance or refusal (for adherence or non-adherence) he often is fully aware that the other party has not read or bargained for many of the incidental terms of the contract. In such a case, to conclude that the adherer is bound by the form clause even though the other party knows he has not read them is to reach a result which is hardly justified on ordinary assent principles from the standpoint of either party to the contract.¹⁴⁶

A California court, recognizing this, has required a showing of "understanding consent" when a standardized adhesion contract is sought to be enforced.¹⁴⁷

Closely related to adhesion contracts is the doctrine of unconscionability.¹⁴⁸ Although California failed to adopt the Uniform Commercial Code section¹⁴⁹ which dealt with this doctrine,¹⁵⁰ a

144. *Steven v. Fidelity Casualty Co.*, 58 Cal. 2d 862, 882, 377 P.2d 284, 297, 27 Cal. Rptr. 172, 185 (1962).

145. A. CORBIN, *supra* note 1, at § 107.

146. M. BENFIELD, *NEW APPROACHES IN THE LAW OF CONTRACTS* (1970).

147. *Bauer v. Jackson*, 15 Cal. App. 3d 358, 93 Cal. Rptr. 43 (1971).

148. An unconscionable contract has been defined as ". . . one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other." *Swanson v. Hempstead*, 64 Cal. App. 2d 681, 688, 149 P.2d 404, 407 (1944).

149. UNIFORM COMMERCIAL CODE § 2-302 provides:

(1) If the court as a matter of law finds the contract or any

judicial doctrine of unconscionability does exist in California.¹⁵¹ Additionally, there is statutory authority in California which prevents the specific enforcement of contracts which are not just and reasonable.¹⁵²

In a leading California case, *Jacklich v. Baer*,¹⁵³ the court applied the equitable rule that contracts will not be specifically enforced if they are so manifestly harsh and oppressive as to shock the conscience. The court placed the burden on the party seeking specific performance to affirmatively show that the contract was fair and

clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

150. The California legislature, however, is at the time of this writing considering amendments to Civil Code § 1770 which would outlaw "unconscionable acts and practices" in consumer transactions. The pertinent statutory section and amendment reads in part:

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are *unlawful*:

“(q) . . . An unconscionable act or practice whether it occurs before, during, or after the transaction. In determining whether an act or practice is unconscionable, circumstances such as the following shall be taken into consideration.

(1) Whether the seller has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, *ignorance, illiteracy, inability to understand the language of an agreement* or similar factors;

(2) Whether the seller knew at the time the consumer transaction was entered into that the price was grossly in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;

(3) Whether the seller knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;

(4) Whether the seller knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligations in full by the consumer;

(5) Whether the seller required the consumer to enter into a consumer transaction on terms the supplier knew were excessively one-sided in favor of the seller;

(6) Whether the seller knowingly made a misleading statement of *opinion* on which the consumer was likely to rely to his detriment.

A.B. 918 (Meade) 1973 Sess. [emphasis added].

151. See Roos, *The Doctrine of Unconscionability Alive and Well in California*, 9 CALIF. WESTERN L. REV. 100 (1972).

152. CAL. CIV. CODE § 3391 (West 1970).

153. 57 Cal. App. 2d 684, 135 P.2d 179 (1943).

just. Consequently, to obtain specific performance of a contract in California, it must be alleged and proved that the contract is not inequitable or unconscionable, and that the consideration is adequate.¹⁵⁴ As with unconscionability under the Uniform Commercial Code,¹⁵⁵ the fairness of the contract is to be determined as of the date of its making.¹⁵⁶ Of course if specific performance is not granted, the party can usually sue for breach of the contract, and since specific performance is only available where there is no adequate remedy at law¹⁵⁷ a suit for breach will be utilized in most cases. Thus the burden is on the other party to either attack or defend the contract on one of the other grounds outlined in this article.

Even though California has not adopted the "unconscionable" section of the Uniform Commercial Code, a brief look at the section and decisions in other states pursuant to it seems merited.

The importance of this doctrine is that it relieves one of the onerous task of proving lack of mutual assent or fraud, and allows the contract or a clause contained therein to be directly attacked on the grounds that it is unduly harsh and oppressive, i.e., "unconscionable." Although many times a contract may be held unconscionable simply because it is just too harsh to one of the parties, many other times the courts impliedly hold that there is more probably than not fraud or lack of mutual assent present when they hold the contract to be unconscionable.

No exact definition of unconscionability under the Code can be articulated.¹⁵⁸ The official comments to the Uniform Commercial Code, Section 2-302 speak of "*oppression and unfair surprise*." A contract drafted in a foreign language to the non-drafting party would clearly be classified as surprise, and courts do use surprise as an indication of unconscionability.¹⁵⁹ To illustrate, as shown

154. *Quan v. Kraseman*, 84 Cal. App. 2d 550, 191 P.2d 16 (1948).

155. See note 149, *supra*.

156. *Goodyear Tire & Rubber Co. v. Miller*, 22 F.2d 353 (9th Cir. 1927).

157. CAL. CIV. CODE § 3384 (West 1970); *Wehen v. Lundgaard*, 41 Cal. App. 2d 610, 107 P.2d 491 (1940).

158. Assembly Bill 918 does attempt to define unconscionability by mandating the consideration of particular circumstances when an attempt is made to determine if an act or practice is unconscionable. See note 150, *supra*.

159. Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

supra,¹⁶⁰ courts do refuse to enforce contractual provisions solely because one of the parties had no knowledge of it. It is also true that the courts will refuse to enforce contractual provisions even if known if to do so would result in an unconscionable result.¹⁶¹ It follows then that if a clause is unknown the court will be more likely to hold it unconscionable than one that was fully disclosed.¹⁶²

There are three cases¹⁶³ that have specifically dealt with the issue of a non-English speaking party, and have applied the unconscionability doctrine. In *Kabro Constr. Corp. v. Carire*,¹⁶⁴ the defendants were being sued on a contract they had signed to have plaintiff remodel their kitchen. Defendants were Spanish speaking and illiterate in the English language. The clause in dispute provided in the event of any breach at any time, the plaintiff contractor could recover 20 percent of the total cash price. The court held this not to be a valid liquidated damages clause and that it was "... nothing more nor less than a device to allow the contractor to 'run with the hares and bark with the hounds.'"¹⁶⁵ The court, in holding that the clause and entire contract were unconscionable and unenforceable, was of the opinion that the era of the application of the doctrine of *caveat emptor* had vanished. The plaintiff argued that if the court ruled the contract unenforceable, sellers would not deal with non-English speaking people in fear of the same result with their contracts. Even though this is a plausible argument, the court dismissed it without comment as having no merit.¹⁶⁶

In *Frostifresh Corp. v. Reynoso*,¹⁶⁷ a Spanish speaking buyer negotiated orally in Spanish with a Spanish speaking salesman. The contract was written in English, however, and was neither explained nor translated to the defendants. No defense of fraud was alleged on behalf of the buyer. The court's finding was:

160. See text accompanying notes 60-67 *supra*.

161. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3rd Cir. 1948).

162. *M. BENFIELD*, *supra* note 146.

163. An expanded discussion of the topic of unconscionability lies beyond the reach of these pages. For more thorough coverage see Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Harrington, *Unconscionability Under the Uniform Commercial Code*, 10 S. TEX. L.J. 203 (1967); Terry & Fauvre, *The Unconscionability Offense*, 4 GA. L. REV. 469 (1970) Note, *Unconscionability: Uniform Commercial Code SECTION 2-302*, 36 ALBANY L. REV. 114 (1971); Comment, *The Uniform Commercial Code's Solution for Unconscionable Contracts*, 48 ORE. L. REV. 209 (1969).

164. *POVERTY L. RPTR.* 11642 (N.Y. Civ. 1970).

165. *Id.* at 11643.

166. *Id.* at 11644.

167. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (1967).

. . . that the sale of the appliance at the price and terms indicated in this contract is shocking to the conscience. The service charge, which almost equals the price of the appliance is in and of itself indicative of the oppression which was practiced on these defendants. Defendants were handicapped by a lack of knowledge, both as to the commercial situation and the *nature and terms of the contract—which was submitted in a language foreign to them*.¹⁶⁸

Although the court mentioned oppression rather than unfair surprise it is apparent that the court felt that defendants' language barrier was an important factor in its holding.

In *Jefferson Credit Corp. v. Marcano*,¹⁶⁹ the contract was printed in English, and the defendant only read Spanish. The court was doubtful if the defendant understood *any* of the terms in the printed form contract. In holding the contract unconscionable the court said:

The application of the doctrine of *caveat emptor* presupposes some parity or equality between the bargaining parties. In the case at bar there is no semblance of such parity. The defendant, Francisco Marcano, with whom the plaintiff's assignor conducted all its business had at best a sketchy knowledge of the English language. It can be stated with a fair degree of certainty that he neither knew nor understood he had waived the implied warranty of merchantability and the implied warranty of fitness for a particular purpose despite the fact that those waivers are printed in large black type in the contract. It is likewise impossible to assume he knew or understood that he agreed not to set up any claims, defenses, counterclaims, setoffs or cross complaints in any action brought by the assignee of the contract.¹⁷⁰

The court correctly recognized that the defendant did not consent either subjectively nor objectively to all the terms of the contract. In view of this the court could have possibly nullified the agreement without resort to the doctrine of unconscionability.

Although freedom of contract has been considered a most cherished right of individual liberty, its use has been abused. Where a purchaser is left with a take it or leave it proposition due to a disparity of bargaining power or where one has a position of bargaining power over another because of the latter's inability to read, there is no real freedom of contract present. The bargain element of contract is absent in both situations, and this is an open invita-

168. *Id.* at 27, 274 N.Y.S.2d 759 (emphasis added).

169. 60 Misc. 2d 138, 302 N.Y.S.2d 390 (1969).

170. *Id.* at 140-41, 302 N.Y.S.2d at 393-94.

tion to a clear possibility of serious injustice.¹⁷¹ The California Legislature has recently acted in an attempt to help alleviate the possibility of abuse in the latter situation. The 1973 session of the legislature amended Civil Code sections 1689.5 through 1689.13 to require that in home solicitation contracts, the contract, as well as notification of the right to cancel such a contract, be written in the same language as is principally used in the sales presentation.¹⁷² This is truly a step in the right direction, and one it is hoped that the courts will soon follow.

DWIGHT PRESTON

171. For an interesting discussion dealing with this consent problem and failure to read the contract in Great Britain see Spencer, *Signature, Consent, and the Rule in L'Estrange v. Graucob*, 32 CAMB. L.J. 104 (1973).

172. Assembly Bill No. 1175, introduced by Assemblyman Fenton, was approved by the Governor on September 17, 1973. This act revises the law of home solicitation contracts in numerous ways. Especially pertinent to this article is section 3 which reads in relevant part:

(a) In a home solicitation contract or offer the buyer's agreement or offer to purchase shall be written in the same language, e.g., Spanish, as principally used in the oral sales presentation. . . . The act provides that if the seller fails to comply with section 3 the buyer may cancel the contract.